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In the Supreme Court of the United States

October Term, 1975

No. 75-1330

Dorcea Mielke, et al.,
Petitioners,

v.

Singara Grotto, Inc., et al.,
Respondents.

REPLY BRIEF OF PETITIONERS

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On Petition for Writ of Certiorari
To the Court of Appeals, Erie County,
Sixth Judicial District of Ohio

REPLY BRIEF OF PETITIONERS

STATEMENT OF THE CASE

On April 6, 1971, the Petitioner, Dorcea Mielke, slipped and fell on a tile floor in a building owned by Singara Grotto, Inc. The floor was covered with a floor finish called Triple Life, which was sold to Singara Grotto, Inc., by the Sandusky Paint Company. Purex Corporation, Inc., the manufacturer, had supplied the product to the vendor paint company. As a result of Petitioner's fall, she became permanently disabled and wheel-chair bound, suffering medical debts in excess of thirty-five thousand dollars ($35,000.00). On March 20, 1973, Petitioners instituted an action for personal injuries received by Dorcea, and loss of services and consortium by her husband, asking for three hundred thousand dollars ($300,000-.00).

REASONS FOR GRANTING THE WRIT

Once a State, by its laws, accords to its citizens the right to trial by jury, the courts of that State are thereby bound by the mandate of the Seventh Amendment to the United States Constitution, prohibiting the trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law.

PETITIONERS REPLY BRIEF

The argument of the Respondents is that the State of Ohio need not grant a jury trial. This argument completely misses the point of this appeal because Ohio does grant a jury trial. Article I, Section 5, Constitutionof the State of Ohio.

The issue is whether once the State of Ohio does grant a jury trial, the Seventh Amendment must then be followed, including that part of the Seventh Amendment which prohibits the trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law.

The Respondents somehow claim that this constitutional infirmity is being raised now for the first time. This is patently not the case. The assignment of error in the Court of Appeals did raise this constitutional argument. The proposition of law in the Ohio Supreme Court did also raise this constitutional argument. In the Ohio Supreme Court, the constitutional violation of the Seventh and Fourteenth Amendments was raised in Proposition of Law No. 1C.

The Respondents cite cases which are completely inapplicable. In the 1875 case of *Walker v. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678, a jury trial was held, and there was a hung jury. Then, and only after the hung jury, trial court decided the case. Whereas, in *Mielke*, petitioners tried a products liability case before an Ohio jury. The Ohio jury decided the case in favor of the permanently crippled petitioner and awarded a substantial, but not excessive, verdict; namely, a verdict of one quarter of a million dollars. The trial court simply disagreed with the jury verdict and not only arbitrarily reversed that jury verdict, but also arbitrarily ordered a

judgment for the Respondents, notwithstanding the jury verdict. The trial court completely lacked any common law grounds to upset the jury verdict. The trial court completely lacked any common law grounds to grant a judgment notwithstanding the verdict on behalf of the Respondents. The Court of Appeals conceded the common law violation as it stated in its Opinion, "Plaintiffs assert with some logic that a finding of assumption of the risk is not consistent with the holding of the trial court that there was no defect." Appendix B of Petition for Writ of Certiorari.

The Respondents argue that the United States Supreme Court has decided this issue and cite *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 86 L.Ed. 147, 61 S.Ct. 189. This Honorable Court has not decided this issue. The Ohio Rule 50 was recently enacted. Whereas, the *Montgomery Ward* case was decided in 1940 long before the Ohio rule was passed. Moreover, staff note to Rule 50 states that the Ohio rule "differs from Federal Rule 50 in important detail." Therefore, the *Montgomery Ward* case dealt with different questions of law and a different rule.

The Respondents cite only one other case; namely, *Neely v. Martin K. Eby Construction Co. Inc.*, 386 U.S. 317, 18 L.Ed. 2d 75. The issue in that case, as stated by the United States Supreme Court, was "pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent." That is not the issue in the case of the Petitioners. The issue in our case is whether the trial court and appellate courts in examining the facts found by the jury are prohibited from examining these facts other than according to the rules of common law. The Petitioners state that the trial court and Court of Appeals are prohibited from examining the facts other than according to the rules of common law. The Respondents argue that there is no right to a

jury and that, therefore, the question does not arise. This argument is a non sequitur since Ohio does and did grant a jury trial. Once Ohio does grant the right to a jury trial, the Seventh Amendment does then apply to the State of Ohio.

This is a case of first impression involving one of the most important parts of the United States Constitution. Hence, the Petitioners urgently and respectfully request the Honorable United States Supreme Court to review this case.

Respectfully submitted,
/s/ Jerry B. Murray

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Petitioners was sent by regular U.S. mail, postage prepaid, to Foster J. Fludine, Attorney for Respondents, at 440 Leader Building, Cleveland, Ohio 44114, this day of May, 1976.

Ronald Culp